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ABSTRACT

In this speech, testing experts or clinical psychologists called to give evidence in court cases on segregation either in the school or the classroom are provided with guidelines in preparing their case in document form with sources ready at hand. It is suggested that as much information as possible be available to the lawyer for whom the psychologist is called to testify, and that strategy be worked out in advance. The litigation that is primarily discussed concerns procedures such as "ability grouping" and standardized tests as methods for assigning children to various groups. Recent documents on testing and ability grouping as well as testimony of expert witnesses on these questions are included. (JW)

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GUIDELINES FOR SERVICE AS AN EXPERT WITNESS IN CIVIL SUITS PERTAINING TO SCHOOL DESEGREGATION

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Guidelines for Service as an Expert Witness

John E. Dobbin

It would be wasteful of your time and of my opportunity not to exploit the advantage of having read two of the other papers before I prepared my own.

My first effort in this direction is to emphasize with as much force as I can Dr. Barrett's central theme and major points. He was wise to limit his presentation to the single point of BEING PREPARED for an appearance as an expert witness. Psychologists are accustomed to preparing for lectures, for the reading of papers at APA, even for speeches at the elementary school PTA. But the amount of preparation we ordinarily put into familiar occasions of this kind is not nearly enough for the occasion of appearing as an expert witness in court. In general, one's preparation for such a task -- at least, the first time -- is truly monumental: comprehensive, organized, carefully defined, documented, indexed, and written out.

Dr. Barrett has said that if one does accomplish this kind of preparation, testifying is routine. I don't agree with that second part, but I think that this point of exhaustive preparation is so very important that I want to join Dr. Barrett in making this the main point of my paper, too, and then go on to some suggestions for how one should prepare for appearance as an expert witness in school desegregation cases.

Psychologists have not been called upon as expert witnesses with respect to testing for very long or very often. One of the first and best documented instances was Dr. Roger Lennon's extensive testimony in the Hobson v. Hansen case (involving the effects of

testing on the segregation of the races in the Washington, D.C., public schools) in 1966. (Ref. 1) I am quite sure that Dr. Lennon will refer to his experience as a witness on that occasion, but in case he is too modest to tell you that his testimony there has been published in full, I want to tell you that this little blue book is to date the most valuable single item for the psychologist who is preparing for service as an expert witness.

My own experience as an expert witness has been acquired in the course of giving testimony in three school desegregation cases and in contributing to the legal preparation for litigation about school desegregation or teacher selection in several other instances. So my limited expertise is related to giving testimony in segretation suits.

A fairly large proportion of cases are settled in one way or another before they reach the stage of formal courtroom hearing. I won't spend much time here on these settled-before-the-trial cases, except to say that one can't predict which case is likely to be settled this way and you have no alternative but to <u>prepare yourself for each case as if you were to be cross-examined for six hours by William Kunstler</u>. The effort will not be wasted even if the case is settled before you are called to the witness stand, because in all likelihood the preparation you have developed and shared with your counsel has been used by him as ammunition for achieving a settlement of the issue before trial.

I must say here, with emphasis and feeling, that the American judicial system has been in my view a <u>tremendously</u> impressive thing in its handling of the knotty problems of school desegregation -- learned, humane, responsive to local and national mores, and above

all superbly sensible. If there were not all these other reasons for being well prepared for a courtroom appearance, I now feel that the opportunity to assist this set of people (judges and courts and attorneys) in their search for social solutions is itself worth every effort I can put into a solid preparation.

Back briefly to reinforcement of certain specifics in Dr. Barrett's outline of elements of preparation, Creating the environment in which the expert gives his testimony is the "discovery process" that Dr. Barrett mentioned. This means simply that each side reveals to the other all of the information it has, plus the direction of the arguments it intends to pursue, <u>if the other side asks for it</u>. (My explanation of this point may not be exactly right in technical terms, but I'm quite sure that it has the effects I'm about to mention.) "Your" attorney -- whichever side you are on -- will ask you, "What should we ask the opponents for in the way of the evidence they intend to present and the arguments they will pursue that are related to use of tests in dividing students into ability groups for instruction." So you use all the know-how and references you can muster and <u>prepare</u> a set of questions about this issue which your lawyer then gets the judge to direct the opposition to answer. Since it is a court-mandated request for information, the opposition may object a bit to the inconvenience this request imposes, and may openly question its relevance to the issues at trial, but they will produce the information by the date the judge has stipulated. Then it is quite likely that the information submitted by the opposition in this process will suggest <u>other</u> requests for still further information -- or remind your attorney of whole new avenues of attack or defense. The point I have led up to here is that even though you may never get to see the judge or the

opposing counsel in a long case that is negotiated before it reaches trial -- the judge and the attorneys on both sides come to know you quite well. Very early in this exchange of interrogations, your attorney will submit to the judge and to opposing counsel a written document that contains a resume' of your professional and personal qualifications -- your pedigree as an expert witness in your field. If you have been around a while and have published a few things and have not appeared to take an extreme prior position on the issue at trial, chances are good that you'll be accepted as a contributor to the process of discovery -- for the time being. And here's my point: if you give less than your full attention and effort to what you put into this process (suggesting to the lawyer what kinds of information he should ask the court to require the opposition to dig up and disclose), or if you suggest requests that appear to the judge to be frivolous or irrelevant or in any way distractive, the judge not only will disallow the request but probably also will write you off as a witness useful to the court. You can cease to be an expert witness without knowing it. So treat every question from your attorney as if it were the most crucial question in the whole case, and prepare for it accordingly.

Dr. Barrett has said that "It is safe to assume ... that lawyers possess a reasonably high level of verbal intelligence, are highly motivated, and can learn quickly." It is not only safe to assume this -- it is absolutely necessary to assume this. (As a matter of fact, I now think that the safest thing to assume is that the opposition attorney is the brightest guy you'll ever encounter in your whole life.) Furthermore, you are suddenly playing what is for you a new game; it was invented by lawyers and is played in their park. If you should be

trapped into talking down to a cross-examining lawyer (or even into thinking down to him as you answer his questions) you are stone cold dead.

Which leads me to another related point that was beautifully illustrated by Dr. Lennon's testimony in the Hobson case. Dr. Barrett has said that lawyers and judges expect short and factual answers to be possible for almost any question -- when in fact, at least in the field of psychological testing, there are many important questions for which the most truthful and helpful answers are long, involved, and full of reservations and qualifications. As you will see if you read the Lennon testimony, Dr. Lennon quite properly did not allow this expectation of the short answer to lead him into hasty generalization or omission of necessary qualifications. It is possible to give too long an answer, I suppose, and waste the Court's time, but on the other hand if one is stampeded into giving over-generalized answers just to cut corners in time, he could easily find himself trapped by a cross-examining lawyer who throws too-general answers back in his teeth. So the admonition is: take the time that is necessary to give a fully accurate response to a question -- and defend your right to do so if you are challenged on it.

A final point in support of Dr. Barrett, then I'll take off briefly on my own. Barrett has said that it is important for a witness to distinguish carefully between what he knows and what he thinks he knows. This is a different game, with different players, than that of lecturing in a classroom -- where such a distinction is not always observed. I think I would state Barrett's recommendation on this point even more strongly, thus: "State as something you know only that for which you can produce documentation on the spot -- or, at the

very least, a detailed quotation with exact references by which your statements can be verified in a library or other source you identify." (I find that I am more confident when I lug with me a valise bulging with practically every known reference on the topic of my expertise -- the books themselves, with bookmarks sticking out of them in every direction. This practice always prompts the opposition attorney to object to having a portable reference library brought into the witness stand, I hear, but I also hear that the judge almost always permits it with some remark about references not constituting any particular threat to anybody.) For an expert with as short and unreliable a memory as mine, a set of notes or a short catalog of one's own references is invaluable when it comes to finding the quote you want from, say, the Encyclopedia of Educational Research or a particular issue of the APA Journal.

If I had time here, I'd like to support each one of Dr. Barrett's points in detail, but I'll save words by pointing out that the record of Dr. Lennon's testimony in Hobson v. Hanson provides illustrations of most of Barrett's points.

So, if and when you get called into service as an expert witness in civil rights cases -- whether as a testing expert or as a clinical psychologist -- I recommend strongly that the first two things you obtain and read should be Dr. Barrett's paper, which you just heard, and Dr. Lennon's testimony. Together, these two pieces will tell you more than any others I know -- what to expect in performance of your duty as a specialist witness and how to execute that performance well.

Now I turn in a concluding section to a few notions about the topics in the field upon which we are likely to be called for expert testimony -- and the sources from which useful preparation can be

drawn. The civil suits about school segregation in which I have been (Ref. 2) involved have all pertained in part to the uses of tests to separate or section school children into groups for purposes of instruction. In all the cases to which I refer, the defendant has been the local (city or county) school district which uses or proposes to use scores on tests of academic ability and/or achievement as criteria upon which children are divided into different groups -- usually going to different school buildings as a consequence of the grouping. The defendant justifies this procedure upon the grounds that "ability grouping" is an acceptable practice in education and that all groups divided in this way get better instruction, more nearly suited to their capabilities. The plaintiff, in each of the cases to which I refer, has represented the parents of children in minority groups (Negro, Mexican-American, Puerto Rican) who claim that (a) ability-grouping does not produce better instruction -- at least, not for the children of minority groups -- and (b) that even if such grouping did lead to better instruction for somebody, the tests used to establish the groups discriminate unfairly against most minority group children and automatically assign them to the lowest groups or tracks. So there are two topics on which people like us are expected to shed some light in the litigation over desegregation procedures in the schools:

1. Does "ability-grouping" (or any other kind of grouping on the basis of academic or intellectual criteria) help anybody to learn better? If so, whom does it help? How much? In what circumstances?
2. Are standardized tests of the kinds schools customarily use valid and dependable tools to use in the assignment of children

to such groups? Do they favor some kids over others for reasons related to their background rather than their learning capacities? If so, in what ways and to what extent?

When I was called upon to serve as an expert witness the first time and these two issues quickly appeared as the central questions, I was reasonably confident of my ability to pull down off my shelves (or at least to ask my friends to pull down off <u>their</u> shelves) enough evidence and expert opinion to provide nearly definitive answers to both questions -- and that would be that. So I was absolutely appalled, and scared to death, by the fact that the literature of research on these two points has not ever been subjected to professional summary -- <u>total</u> professional summary -- and over-all interpretation. I had read a lot of the bits and pieces that constitute research in these areas, but this was the first time that I tried to find answers to the general question: "What does all the technically acceptable research conducted in modern times lead us to conclude about the effectiveness of ability-grouping as a device for the improvement of teaching?" Or answers to the general question: "What happens to minority kids when they are "grouped" according to their performance on standardized tests?"

I was at first horrified by the total helter-skelterishness of the research evidence bearing on the two central questions of grouping and testing, but, having made the commitment, I had no choice but to attempt the collection and reduction and summary of information myself. This turned out fairly well for two reasons that have nothing to do with the quality of my testimony: (a) the opposing lawyer had <u>not</u> done his homework well, and (b) the judge concluded that the issue of the unitary school system would have to be settled

to his satisfaction before he would rule on the use of tests for grouping. But the experience led me to raise the question with old friends in the business: "Shouldn't we be able to tell people what our professional knowledge adds up to on questions like these -- and be able to document our answers sufficiently to remove them from the realm of guessing or simple side-taking?" All agreed that we should be able to do these things but that at present we could not.

Then, galloping over the horizon like the U.S. Cavalry, came help. Under the chairmanship of Professor Warren G. Findley at the University of Georgia, a far-flung committee of professionals was formed to assemble, sort, categorize, review, and summarize all modern research evidence bearing on these two questions of ability-grouping and grouping-by-test. Further, having done all this, the committee was to produce a condensed set of recommendations for educators that would bring their findings to bear on all problems of educational practice related to grouping. The assignment was tremendous because, as you would expect, the work of the committee was done mostly by two or three people. But it was done and it has been reported and it is available as a vast new set of resources for those of us who have the nerve to serve as experts in this field. Here, then, is the set of references that will help you to decide WHAT to say in court on these topics, in somewhat the same way that the Barrett and Lennon references will help you decide HOW to say it.

Since the U.S. Office of Education has provided funds for some of the expenses engendered by this intensive activity, the committee reports and recommendations have been written in the form of reports to the U.S.O.E., but for the time being at least they will be available from the Center for Educational Improvement at the

University of Georgia. There are (or will be) four documents in this series:

I. Common Practices in the Use of Tests for Grouping Students in the Public Schools.

II. The Effects of Ability Grouping Upon
   (a) School achievement and affective development of all children.
   (b) Ethnic and socioeconomic separation of school children.

III. Problems and Utilities Involved in the Use of Tests for Grouping Children with Limited Backgrounds, and Alternative Strategies to Such Grouping.

IV. Conclusions and Recommendations.

At the risk of spoiling the movie for you by telling you how it turns out, I'd like to quote here form a letter written by Dr. Findley:

"My interpretation of the findings of this study is that (1) ability grouping is generally less effective in promoting learning than is heterogenous grouping; (2) at the same time it stigmatizes those of lower achievement or 'aptitude' so that they fail to enjoy the benefits of a positive self-image; (3) the effect is to separate children on a basis linked most closely to socioeconomic status; (4) a corollary effect is to separate children of minority groups from those of the majority group; (5) the research of McPartland in particular demonstrates that achievement of minority group children increases with the proportion of majority group children in the individual classrooms; (6) there are many more promising strategies for the promotion of learning than ability grouping -- including such things as peer-tutoring, team teaching, early childhood

instruction, and programmed instruction; (7) tests and other measures can be used constructively to guide the learning of individuals and groups if they are used at each step to diagnose and prescribe individual learning; and finally (8) action to improve instruction by desegregation will be successful in urban situations only to the extent that it can be applied before the 'flight to the suburbs' produces resegregation."

Imagine the authority we can now carry into our role as expert witnesses on these questions! Not only is the research summarized and interpreted, but the documentation has been done! If you find yourself in strong disagreement with the way in which the committee has treated one of your own prejudices, you have the rare privilege of using the committee's bibliography of all the recorded research on the topic to help you find the evidence upon which to base your own conclusions. This is an event of significant importance in the maturation of educational psychology. I hope that it becomes widely recognized as such -- and that its outcomes are given application in schools across the land.

If you should need copies of these documents for your own use as an expert witness before they become generally available in print, write to Dr. Warren G. Findley, Center for Educational Improvement, College of Education, University of Georgia, Athens, Georgia 30601. He will handle response to your request.

Allow me to hope that I have not turned any of you away from acceptance of an invitation to serve as an expert witness in your field. It is a terribly demanding assignment, but at the same time a delightfully rewarding one. It is as scary as skiing down the

steep side of the Matterhorn -- and as surprisingly satisfying as arriving at the bottom in one piece. My blessings on all who try.

John E. Dobbin

Princeton, New Jersey

August, 1970

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2. Ability Grouping: 1970

Document I: Common Practices in the Use of Tests for Grouping Students in Public Schools (now available)

Document II: The Effects of Ability Grouping Upon School Achievement, Affective Development, Ethnic and Socioeconomic Separation (in final preparation, available fall of 1970)

Document III: Problems and Utilities Involved in the Use of Tests for Grouping Children with Limited Backgrounds, and Alternative Strategies to Such Grouping (in final preparation, available fall of 1970)

Document IV: Conclusions and Recommendations (now available)

Athens, Georgia. Center for Educational Improvement, University of Georgia.